No. 10-738

IN THE

Supreme Court of the United States

RITCHIE SPECIAL CREDIT INVESTMENTS, LTD., et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT GREGORY M. BELL

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STATEMENT OF THE CASE

Petitioners Ritchie Special Credit Investments, Ltd., *et al.* claim that the United States District Court for the District of Minnesota erred by not awarding them restitution under the Mandatory Victims Restitution Act ("MVRA") and the Crime Victim Rights Act ("CVRA") for losses that they allegedly suffered as purported victims of the fraud to which respondent Gregory Bell pleaded guilty. Specifically, Petitioners contend that it was improper for the district court to consider the availability of alternative remedies in determining whether to award restitution under the MVRA. However, Petitioners never raised this argument in the district court. Moreover, even if Petitioners had done so, they would have had no standing because they were not victims of Bell's crime.

Wholly apart from these procedural obstacles, this case presents no compelling issue for the Court's review. In fact, there is no true split of authority between the circuits over the issue of whether it is appropriate to consider the availability of alternate remedies in determining not to award restitution under the MVRA and the CVRA on the ground of complexity. Moreover, the district court properly applied the law when it imposed a sentence on Bell without restitution and the Eighth Circuit's denial of Petitioners' mandamus petition was correct.

Respondent Gregory Bell pleaded guilty on October 7, 2009 to a one-count information charging him with wire fraud, in violation of Title 18, United States Code, Section 1343, because of material omissions and misrepresentations he made to investors in his hedge funds about those funds' investments in promissory notes

("PCI Notes") issued by Petters Company, Incorporated ("PCI"). (Bell Inf. at 1, Bell Dkt. #40.) The fraud to which Bell pleaded guilty was separate from (albeit related to) the massive Ponzi scheme that respondent Thomas Petters perpetrated. (U.S. Sent. Pos. Paper at 6, Bell Dkt. #58 ("Bell was not part of the underlying Petters fraud.")) Petters and respondents Deanna Lynn Coleman, Robert Dean White, Michael Catain and Larry Reynolds were charged in separate instruments with crimes arising out of their participation in that scheme. Petters was convicted after trial and the other respondents pleaded guilty; each was sentenced separately. (Petters Verdict, Petters Dkt. # 361; Plea Hrng. Mins. for Coleman (Dkt. #3), White (Dkt. #4), Catain (Dkt., #3) and Reynolds (Dkt., #4).) As a result, Bell was not a "co-defendant" of Petters or any other of the Petters co-conspirators, as Petitioners assert.[1]

Through a series of affiliates, Bell owned and controlled a management fund which advised, and was the general partner of, three hedge funds: Lancelot Investors Fund, LP, Lancelot Investors Fund II, LP and Lancelot Investors Fund, Ltd. (collectively, "Lancelot"). (Bell Sent. Pos. Paper at 1, Bell Dkt. #57; Bell Dkt. #58 at 1.) Bell's crime was raising money for Lancelot between February and September 2008 from investors while deceiving those investors about the fact that the primary investment into which such money would be placed—PCI Notes—was woefully delinquent. (Bell Dkt. #58 at 3 & 6-7.) In fact, Petters had been conducting a massive Ponzi scheme

1. Respondent Katz pleaded guilty to a charge of conspiracy to commit wire fraud in connection with the Bell fraud. (Katz Plea Hrng Mins, Katz Dkt. #9; Transcr. of Katz Sent. Hrng. at 2, Katz Dkt. #32.)

for at least 13 years and, as a result, the PCI notes were worthless. (Bell Dkt. #57 at 1; Bell Dkt. #58 at 1.)

Although Bell did not learn that PCI was a house of cards until Petters' arrest on September 24, 2008, Bell did know, in late 2007, that PCI had started to become delinquent in making payments on its notes. (Bell Dkt. #57 at 1.) Bell did not disclose these late payments to Lancelot's investors, but instead executed an extension agreement with PCI that extended the repayment terms of all PCI Notes from 180 to 270 days. (Bell Dkt. #57 at 2; Bell Dkt. #58 at 2.) Bell did not disclose this extension agreement to Lancelot investors unless specifically asked and, even then, he did not reveal the fact that the extension was prompted by PCI's delinquencies. (Bell Dkt. #57 at 2; Bell Dkt. #58 at 2-3.)

The 90-day extension only delayed PCI's payment problems and, by February 2008, the PCI Notes were again delinquent. (Bell Dkt. #57 at 2; Bell Dkt. #58 at 2.) Bell did not disclose these delinquencies, either, but, rather, engineered "round-trip" transactions that gave investors and potential investors the false impression that PCI was paying its notes in a timely manner. (Bell Dkt. #57 at 2.) Accordingly, Mr. Bell's crime was taking "in more than two hundred million dollars [into Lancelot] in new investor money [between February and September 2008] without telling any of the new investors that there were any problems with the PCI [N]otes." (Bell Dkt. #58 at 3.) This crime amounted to a "separate and independent" fraud from that committed by Petters and his associates. (Bell Dkt. #58 at 6.)

Petitioners assert that they are victims under the MVRA and the CVRA, and entitled to restitution, because they were defrauded into loaning $189 million to Petters, most of which was lost when Petters' Ponzi scheme collapsed. (Pet. for Cert. at 2-3.) As a result of this loss, Petitioners may have a basis to claim that they were victims of Petters and the other respondents who pleaded guilty to participating in Petters' fraud; however, they were not victims of Bell's separate fraud. To the contrary, Petitioners invested in Lancelot between 2002 and 2005, well before the February 2008 to September 2008 fraud to which Bell pleaded guilty. (Mandamus Pet. at 3-4 & n. 1.)

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

This Court should deny the writ entirely for the reasons stated in the brief of respondent Petters, which we incorporate by reference. However, regardless of the disposition of the writ as to the other respondents, there are two additional reasons for denying the writ in *Bell*. ***First***, Petitioners did not preserve their claims of error in *Bell*, as they failed to assert their arguments in the district court. ***Second***, Petitioners lack standing to seek the relief they request (restitution from Bell) because they are not victims of Bell's crime.

I. Petitioners Forfeited Their Claims Of Error By Not Asserting Their Arguments In The District Court.

Petitioners never objected to the district court's consideration of alternative remedies in considering whether to decline to award restitution pursuant to the MVRA's complexity exception. As a result, their claims

of error as to *Bell* are unpreserved. *See* Fed. R. Crim. Pr. 51(b).

The district court issued a brief opinion on July 2, 2010 announcing its intent not to order restitution when it imposed sentence on Bell and respondent Katz. (July 2, 2010 Order, Bell Dkt. #47.) That order, however, was issued almost three months before the district court sentenced Bell on September 30, 2010, (See Bell Dkt.) and Petitioners had ample opportunity to present their objections. Indeed, Petitioners subsequently filed a motion to vacate that order.[2] (Mot. to Vacate, Coleman Dkt. #34.) That motion presented a number of reasons why the court should vacate its order and award restitution but did not present the argument set forth in the question presented, *i.e.*, that the MVRA prevents a court from considering the ability of victims to recoup losses in alternative forums in determining whether to decline to order restitution under the MVRA's complexity exception.[3] (Coleman Dkt. #34.) The District Court also provided an opportunity for any victims to be heard in person at Bell's sentencing hearing; however, Petitioners did not even appear at sentencing much less present the argument that they now ask this Court to consider. (Bell Sent. Hrng Transcr. at 1-3, Bell Dkt. #70.)

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2. The motion was captioned with the docket numbers of six different cases, including Bell's, but was docketed only in *United States v. Coleman*, 08-cr-00304. (Coleman Dkt. #34.)

3. Petitioners suggest that they were prevented from fully developing their record in the district court. (Pet. for Cert. at 7, note 2.) However, if Petitioners believed the record was incomplete, they should have sought to correct or modify it, pursuant to Fed. R. App. Pro. 10(e).

Under the circumstances, Petitioners had no right to seek mandamus relief from the Eighth Circuit, much less a compelling basis for discretionary review by this Court. In particular, Federal Rule of Criminal Procedure 51(b) provides: "A party may preserve a claim of error by informing the court – when the court ruling or order is made or sought – of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection." Here, despite having almost three months in which to do so, Petitioners never once set forth "the grounds for that objection," as the Rule requires. Accordingly, this claim of error is unpreserved. *Cf. Henderson v. Kibbe*, 431 U.S. 145, 154 n. 12 (1977) ("orderly procedure" requires an objection, so that an issue may be addressed).

II. Petitioners Were Not "Victims" Of Bell's Fraud And Therefore Lack Standing.

The MVRA defines a "victim" as any "person directly and proximately harmed as a result of the commission of an offense . . . including, in the case of an offense that involves as an element a scheme, . . . any person directly harmed by the defendant's criminal conduct in the course of the scheme . . . ." 18 U.S.C.A. § 3663A(a)(2). The definition in the CVRA is nearly identical. *See United States v. Speakman*, 594 F.3d 1165, 1171 n. 3 (10th Cir. 2010). Under these definitions, petitioners were not in fact victims of Bell's crime. (Bell Dkt. #58 at 6.) Indeed, the Petition itself does not even articulate any harm that Petitioners purportedly suffered that was proximately caused by Bell's scheme.

To the contrary, the Petition merely asserts that "Petters and his co-conspirators bilked their victims by borrowing huge sums evidenced by promissory notes," Petition at 2; "[b]etween February and May, 2008, . . . petitioners loaned a total of $189 million to Petters and his companies in a series of [fraudulent] short-term notes," *id.* at 3; and, when Petters' Ponzi scheme collapsed, "Petters and his companies owed [Petitioners] more than $165 million." *Id.* There is no mention of Bell and with good reason: Bell was not charged with participating in Petters' Ponzi scheme. Bell's crime was much narrower; he was charged with defrauding Lancelot investors over a discrete period of time – February 2008 to September 2008 – by deceiving them about the performance of Lancelot's investments in PCI notes. Thus, only those who invested in Lancelot during that time period are victims of Bell's crime. As Petitioners themselves admitted in their original "Motion Pursuant to 18 U.S.C. 3771(A)(4) and Fed. R. Crim. P. 31(I)(4)(B) & 60(A)(3) to be Heard at the Sentencings of Defendants" in the district court, "Affiliates of the Lancelot Investors made investments in the Lancelot Funds between 2002 and 2005 and subsequently transferred those investments to the Lancelot Investors *prior to 2008*." (Mot. to be Heard at 8, Coleman Dkt. #33 (emphasis added).) Because those investments were admittedly completed years before Bell's scheme even began, Petitioners cannot be victims of Bell's crime.[4] Accordingly, Petitioners have no claim for

4. Petitioners may indeed have lost money as a result of their early investments in Lancelot, but any such losses would have been a result of Bell's and Lancelot's mistaken (but not criminal) decision to invest Lancelot funds in PCI Notes, which turned out to be virtually worthless. Those early, bad investment decisions, however, are not part of Bell's fraud because there is no allegation

restitution and lack standing under the MVRA. 18 U.S.C. § 3771(d)(1) ("the crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a).")

CONCLUSION

For the reasons stated above and in the opposition of respondent Petters, the writ of certiorari should be denied.

Respectfully Submitted,

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in the information to which Bell pleaded guilty that Bell knew the PCI Notes were worthless at that time. (Bell Dkt. #40.)